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Supreme Court of the United States

October Term, 1979

No. 79-294

CREDE CALHOUN,
Petitioner,

vs.

THE SUPREME COURT OF OHIO
and
THE JUSTICES THEREOF,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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TABLE OF CONTENTS

Jurisdictional Statement 1
Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional Provisions and Rules 3
Raising a Federal Question 4
Statement of the Case 4
The Question Is Substantial 7
Conclusion 9

Appendix:

Order of the Supreme Court of Ohio Denying Motion for Rehearing (May 25, 1979) A1
Order of the Supreme Court of Ohio Dismissing the Case (April 26, 1979) A2
Complaint in Mandamus Filed in the Supreme Court of Ohio - Case No. 79-177 ..... A3

TABLE OF AUTHORITIES

Constitutional Provisions and Rules

U.S. Const., Amend. XIV 1, 2, 3, 4
Ohio App. R. 12(A) 3, 4
Code of Judicial Conduct, Canon 3(C) 3, 7

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JURISDICTIONAL STATEMENT

Crede Calhoun appeals from the final judgment of the Supreme Court of Ohio dated April 26, 1979, dismissing an action he and The Cuyahoga County Bar Association brought against the Supreme Court of Ohio and its Justices and which involved their stewardship, as Trustees, of a million dollar Trust Fund. By refusing to disqualify themselves, the Justices of the Supreme Court of Ohio held that they, as Judges, can sit in judgment of an action involving the legality of their conduct as Trustees of this Fund, without violating Petitioner's rights to due process of law guaranteed under the First Section of the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The judgment and opinion below are set forth verbatim:

"This cause originated in this Court on the filing of a Complaint for a writ of mandamus and was considered in the manner proscribed by law. On consideration thereof, it is ordered by the Court that the Motion to Dismiss be sustained and cause dismissed."

JURISDICTION

The judgment of the Supreme Court dismissing the mandamus action of Petitioner and the Bar Association was rendered on April 26, 1979. Their Motion For Rehearing was denied on May 25, 1979. The jurisdiction of the Supreme Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether Petitioner's rights to due process under Section One of the Fourteenth Amendment of the United States Constitution were violated by the conduct of the Justices of the Supreme Court, in refusing to disqualify themselves in an action in which they are parties and in which they have a substantial financial interest.

2. Whether Petitioner's rights to due process under Section One of the Fourteenth Amendment of the United States Constitution are violated by the refusal of the Supreme Court of Ohio to require the Court of Appeals to rule on the substantial questions of federal and state law raised on appeal including the corresponding failure of the trial court in the same respect.

CONSTITUTIONAL PROVISIONS AND RULES

Section One, Fourteenth Amendment, United States Constitution

"* * * Nor shall any state deprive any person of property without due process of law. * * *"

Ohio Appellate Rule 12(A)

"* * * All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error."

Code of Judicial Conduct, Canon 3(C)

"C. Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * * * *

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party. * * *"

RAISING A FEDERAL QUESTION

The federal question was raised below by Amici, American Civil Liberties Union of Cleveland, Inc., pursuant to leave granted by the Ohio Supreme Court on April 5, 1979, to file a brief Amicus Curiae. At page 4 of this brief, Amici asserted that the principle of Rule 12(A) "embodies the fundamental principle of due process under the Fourteenth Amendment of the United States Constitution that a tribunal of any type must fully and fairly decide the issues presented to it." At page 6 of its brief, Amici asserted that "the right to an impartial decision maker is fundamental to the guarantee of due process."

STATEMENT OF THE CASE

On February 9, 1979, Petitioner Crede Calhoun together with The Cuyahoga County Bar Association, as Relators, filed an original action in Mandamus in the Supreme Court of Ohio against Robert Holmes and two other Judges of the Tenth Appellate District of Ohio, as Respondents, with Frank D. Celebrezze and the other Justices of the Ohio Supreme Court joined as necessary party Respondents.

In substance the mandamus complaint averred:

(1) The establishment, by court rule, of the Office of Disciplinary Counsel to be financed by requiring all attorneys, as a condition of practicing law in Ohio, to pay a biennial fee of $50.00;

(2) The circumstances of an action for declaratory judgment brought by Relators in the Common Pleas Court of Franklin County, Ohio, against Respondents, asking for an adjudication of the rights, privileges and obligations of

Respondents and Relators with reference to the asserted claim of Respondents of the inherent power to raise and spend public funds for the purpose of disciplining lawyers and policing the unauthorized practice of law without accountability to anyone; i.e., free from any requirements of public disclosure, accounting and audit and free from any of the safeguards provided by the Ohio Constitution and Statutes to insure the proper and legal expenditure of public funds and conduct of public office;

(3) While discovery proceedings were in process and interrogatories to Respondent Justices unanswered, a Motion for Judgment on the Pleadings was granted by the Common Pleas Judge, which judgment was appealed to the Court of Appeals for the Tenth District of Ohio;

(4) In the Court of Appeals, Relators assigned and briefed numerous errors which the court failed and refused to pass upon, including the granting of judgment by the trial court:

(a) Refusing discovery;

(b) Refusing to declare what rights the Plaintiffs might have under any set of facts provable under the Complaint;

(c) Refusing to declare whether there are any constitutional, statutory or other legal limits imposed upon Defendants in raising and holding and expending such funds, including the obligations of public disclosure, accounting and audit;

(d) Refusing to declare whether the Justices could, in dealing with the unauthorized practice of law by laymen, exercise an unlimited and uncontrolled right to expend whatever funds and to employ any number of personnel for such purposes.

The Complaint requested that Respondent Justices disqualify themselves, appointing seven judges of the Court of Appeals, chosen by lot, to sit in their place and prayed for a writ directing the Court of Appeals' judges to comply with their mandated duty to decide the questions presented.

On March 9, 1979, the Respondent Supreme Court Justices undertook to file in the court over which they preside, their Motion to Dismiss, arguing that there was "nothing in the complaint" which could support a finding that they had a duty, much less a definite, specific and absolute duty to disqualify themselves. Respondents further argued, to themselves, that Relators had a plain and adequate remedy by way of appeal to the Supreme Court which the court subsequently refused to allow.

Respondents' Motion to Dismiss was answered by brief of Relators setting forth the numerous violations of the Code of Judicial Conduct and pointing out that the granting of relief prayed for in the mandamus action could result in the discovery of misappropriations and misapplications of the Trust Fund under the stewardship of the Justices. This brief also pointed out there is no effective right of appeal from the Court of Appeals to the Supreme Court of Ohio, and that the only remedy was the right to petition the Supreme Court to certify the judgment of the Court of Appeals for its consideration.

After the filing by the American Civil Liberties Union of Cleveland, Inc. of their brief raising the federal questions herein asserted, the Supreme Court on April 26, 1979, entered the judgment appealed with no statement of reasons and with no report of its action.

On May 4, 1979, Relators filed a Motion for Rehearing, pointing out the obligation of the Supreme Court of Ohio

under Article IV, Section 3(C) of the Constitution of Ohio providing:

> "The decision in all cases in the Supreme Court shall be reported, together with the reasons therefor."

On May 8, 1979, by letter of their counsel to the Clerk of the Supreme Court, Respondents advised that they were waiving their right to file a memorandum in opposition to Relators' Motion for Rehearing. On May 25, 1979, the Supreme Court denied rehearing.

THE QUESTION IS SUBSTANTIAL

The recent trend in which the highest court in a state assumes the inherent power to raise and spend public funds to finance the discipline of attorneys and, in Ohio, the regulation of the unauthorized practice of law, can be expected to spread to other states. If there are constitutional and legal limits to the amount, manner and purposes for which courts can raise and administer such funds, no practical procedure exists to establish and enforce these limits, if the Trustees of these funds can avoid a due process determination of the legality and propriety of their stewardship simply by virtue of the position which they occupy in the hierarchy of judicial administration.

Throughout this entire controversy, the Respondents have refused to acknowledge that in the raising, holding and disbursement of these funds they act not as judges or in a judicial capacity but as administrators.

The present appeal involves the conduct of the Ohio Supreme Court Justices in judicially confirming the *undisputed* evasion by the lower courts of their duty to delineate the obligations of the Justices, including the lower court's

duty to permit discovery of the facts as to the handling by the Justices of this fund of over a million dollars. Petitioner, and other Ohio attorneys, who are subject to assessment as a condition of their continued right to practice their profession as attorneys in Ohio, are denied due process when the assessors assume the ultimate power to themselves determine the legality of their own conduct.

The concept that judges can raise and spend public funds without accountability to anyone is an appealing concept to men who do not question their own goodness and integrity and desire efficient administration unimpeded by any of the fundamental and basic requirements imposed upon public officers in a Democracy in the raising and expenditure of public funds. The view that their administrative powers can be protected from any erosion, as a practical matter, because in their adjudicative capacity they can ignore basic and fundamental principles of procedure, the Code of Judicial Conduct and due process will not be lost on the judges of the highest courts of other states.

The failure of this Court to stop this growing trend for more "efficient judicial administration" of attorney discipline procedures could be compared in its effect with the action of parents giving unlimited charge privileges at the local candy store to their overweight, diabetic and gluttonous child.

CONCLUSION

For the foregoing reasons, the Court should note the probable jurisdiction of this appeal.

Respectfully submitted,

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August 20, 1979

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DENYING MOTION FOR REHEARING

(Dated May 25, 1979)

No. 79-177

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

CREDE CALHOUN, *et al.*,
Relators,

vs.

ROBERT E. HOLMES, Judge, *et al.*,
Respondents.

REHEARING

It is ordered by the court that rehearing in this case is denied.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE CASE

(Dated April 26, 1979)

No. 79-177

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

CREDE CALHOUN, *et al.*,
Relators,

vs.

ROBERT E. HOLMES, Judge, Tenth Appellate District, *et al.*,
Respondents.

IN MANDAMUS ON MOTION TO DISMISS

This cause originated in this court on the filing of a complaint for a writ of mandamus and was considered in the manner prescribed by law. On consideration thereof, it is ordered by the court that the motion to dismiss be sustained and cause dismissed.

COMPLAINT IN MANDAMUS FILED IN THE SUPREME COURT OF OHIO

Case No. 79-177

IN THE SUPREME COURT OF OHIO

CREDE CALHOUN, and THE CUYAHOGA COUNTY BAR ASSOCIATION,
Relators,

vs.

ROBERT E. HOLMES, ARCHER E. REILLY, JOHN W. McCORMAC, Judges, Tenth Appellate District,
Respondents,

and

THE SUPREME COURT OF OHIO, FRANK D. CELEBREZZE, THOMAS M. HERBERT, RALPH LOCHER, A. WILLIAM SWEENEY, WILLIAM B. BROWN, PAUL W. BROWN, Justices of the Supreme Court of Ohio,

and

THOMAS L. STARTZMAN, Clerk,
The Supreme Court of Ohio,
Necessary Parties Respondents.

COMPLAINT IN MANDAMUS
JURISDICTION

1. This action is brought pursuant to Article IV, Section 2(B)(1)(b), vesting in the Supreme Court of Ohio original jurisdiction in Mandamus. Relators request a writ commanding respondent Appellate Court Judges to comply with the clear provisions of Appellate Rule 12(A), specif-

ically commanding that on an appeal from a judgment of the Common Pleas Court, said Judges pass upon all errors assigned and briefed, in writing, stating the reasons for the Court's decision.

FIRST COUNT

2. Relator, Crede Calhoun (hereinafter referred to as "Relator"), is a member of the Bar of the State of Ohio, having been duly admitted to such practice and licensed by the Supreme Court of Ohio.

3. Plaintiff, The Cuyahoga County Bar Association (hereinafter referred to as "Relator Association"), is a non-profit corporation organized under the laws of the State of Ohio.

4. Necessary party respondent, Frank D. Celebrezze, is the duly elected Chief Justice of the Supreme Court of Ohio. Necessary party respondents, Thomas M. Herbert, Ralph Locher, A. William Sweeney, William B. Brown and Paul W. Brown are duly elected Justices of the Supreme Court of Ohio. (The foregoing will hereinafter be referred to as "Supreme Court" or "Respondent Justices.")

5. Respondents Robert E. Holmes, Archer E. Reilly and John W. McCormac are the duly elected judges of the Tenth District Court of Appeals. (The foregoing will be hereinafter referred to as "Court of Appeals" or "Respondent Appellate Judges.")

6. Effective October 25, 1975, the Supreme Court adopted Rules For The Government Of The Bar, requiring all attorneys in Ohio to pay a fee of $50.00 biennially for the stated purpose of financing:

(a) the expenses of a new state agency to be established by said rules to be known as the Office of Disciplinary Counsel, including the compensation of Disciplinary Counsel and Assistant Disciplinary Counsel to be appointed to Respondent Justices, and to include the compensation of other personnel employed and the expenses in providing office facilities, furnishings, stationery, equipment and office supplies.

(b) financing the expenses, including reasonable attorney's fees, of Bar Associations successfully prosecuting actions for the unauthorized practice of law.

7. Relators filed an action in the Federal Courts asserting that said Rules For The Government Of The Bar were beyond the power of the Supreme Court under the Ohio Constitution and violated federal constitutional rights of Relators. In said action, the Federal Courts refused to and did not consider any questions of state law involving the power of Respondent Justices under the Ohio Constitution, including the question whether it would be a violation of Relator's federal constitutional rights if it were determined in the state courts that the Supreme Court of Ohio had the inherent power to raise monies from attorneys, accumulate it, spend it and appoint public officers and employees free from any limitations or controls exercisable by the people of Ohio, the Legislature of Ohio or the Executive Departments of Ohio.

8. Thereafter, Relators, as plaintiffs, filed an action for a Declaratory Judgment under the provisions of Chapter 2721 against Respondents Supreme Court Justices and Respondent Startzman in the Common Pleas Court of Franklin County, seeking a declaration of the rights, liabilities, duties and obligations of Respondents and Relators under the circumstances.

9. In their complaint, Relators averred that Respondent Justices had raised approximately a million dollars,

and under said rules were attempting to exercise unlimited power to appoint public officers, to raise public revenues and appropriate same free from and not subject to any external controls and proscriptions provided in the Constitution and Statutes of Ohio in an attempt to confer upon themselves special privileges and immunities from public disclosure, accounting and audit and all other safeguards governing the raising and expenditures of public funds and appointment of public officers, in contravention of numerous provisions of the Ohio Constitution and Statutes of Ohio.

10. Respondents Supreme Court Justices first filed a motion requesting dismissal of said complaint on the ground that their actions were not subject to challenge or review in any court, and thereafter, when said motion was denied, filed their answer denying most of the averments of Relators' complaint including the averment that Respondents had raised a fund of approximately a million dollars.

11. Thereafter, and while discovery proceedings were in process including interrogatories by Relators to Respondent Justices which were unanswered, said Justices filed a motion under Ohio Civil Rule 12(C) for judgment on the pleadings on the ground that they were entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

12. On March 2, 1978, the trial judge, Judge J. Craig Wright, filed a Judgment Entry in which the motion for judgment on the pleadings was adjudicated in the following language:

> "The motion of the defendants for judgment on the pleadings, for the reasons contained in the Opinion Of the Court which was read into the record on February 10, 1978, is sustained and final judgment is rendered in favor of the defendants."

13. In Judge Wright's Opinion given orally at the hearing on February 10, 1978, on the Supreme Court's motion, Judge Wright stated that the Clerk of the Supreme Court was not required to pay the funds collected into the State Treasury under the provisions of Ohio R.C. Sections 131.01 and 131.07 since if this were the case, the Court would have to find these Statutes invalid as in conflict with the inherent authority of the Supreme Court to promulgate rules and that to avoid this, it must be presumed that the Legislature was aware of the principles of separation of powers and did not intend to reach the funds presently being collected by the Supreme Court and decided no other issues of law or fact raised by the complaint and answer and declared no facts, rights, status or obligations of the parties.

14. Objections were duly filed with Judge Wright by Relators to the proposed judgment entry for the reason that the trial court did not consider all the facts, entered its judgment without a trial and the introduction of evidence on the disputed facts, did not declare the facts found and did not declare the rights and status of the parties with respect to each issue raised by the complaint, the defendant's answer and the requests for declaration of rights set forth in said complaint. These objections were ignored by the trial judge.

15. An appeal was duly perfected from said judgment by Relators to the Tenth Appellate District Court of Appeals, Franklin County, Ohio.

16. In said appeal, Relator Association assigned as error the following errors:

"1. The Court erred in attempting to dispose of this action, being an action for a declaratory judgment, by rendering a judgment on the pleadings.

2. The Court erred in attempting to incorporate in its judgment for a declaratory judgment 'reasons contained in the opinion of the Court' which reasons were nowhere filed in this cause and have not been recorded in or constitute a part of the judgment entry or of any entry of the Court.

3. The Court erred in undertaking to dispose of this action for a declaratory judgment by a judgment on the pleadings when there are important issues of fact between the parties, the determination of which requires consideration of substantial evidence which the plaintiffs were prevented from presenting.

4. The Court erred, when, at the time interrogatories addressed to the defendants were pending and unanswered, it gave notice to the parties of its decision to render judgment on the pleadings in favor of the defendants, and thereafter declined to require sufficient and proper answers to the pending interrogatories.

5. Numerous issues of law, in addition to issues of fact, are raised by the complaint and by the answer in this cause and constitute justiciable issues between the parties. By failing and refusing to find and to declare any one and each of the many principles of law determinative of such issues, the Court committed error.

Making of each such issue a separate and independent assignment of error herein, the appellants allege that the Court erred as follows:

(a) In failing and refusing to determine whether all funds referred to in the complaint, received by the defendants, are subject to the provisions of O.R.C. 131.01 and O.R.C. 131.07.

(b) In failing and refusing to determine whether a payment made by the plaintiff Calhoun, to the defendant Startzman, was received for the state of Ohio under O.R.C. 131.01 and was revenue of the state of Ohio under O.R.C. 131.07.

(c) In failing and refusing to determine whether the defendant Startzman, is a state officer within the meaning of O.R.C. 131.01 and whether said defendant is a collector and receiver of revenue of the state of Ohio under O.R.C. 131.07.

(d) In failing and refusing to determine whether the defendants and each of them, are entitled to a special immunity from public disclosure, accounting and audit except such as said defendants may choose to permit.

(e) In failing and refusing to determine whether the defendants, and each of them, have a special immunity and are exempted from requirements, in the expenditure of funds, set forth in Article II, Section 22 of the Constitution of Ohio.

(f) In failing and refusing to determine whether or not, in the receipt and expenditure of funds referred to in the complaint are exempt from the principles embodied in Article I, Section 2 of the Constitution of Ohio.

(g) In failing and refusing to determine whether the privilege claimed by the defendants, and by each of them, from compulsory public disclosure, accounting

and audit, constitutes a special privilege and immunity to which the defendants are entitled, or in violation of Article I, Sections 2 and 20 of the Constitution of Ohio.

(h) In failing and refusing to determine whether or not power has been delegated by the people of Ohio under the Constitution of Ohio to the defendant to levy, impose or assess by any rule, an imposition or financial obligation upon any individual or group of individuals for the purpose of raising revenue to generate funds to be used in the exercise of police power by said defendants.

(i) In failing and refusing to determine whether or not expenses deemed necessary by the defendants in carrying out the policy powers executed by them constitute expenses of the state of Ohio.

(j) In failing and refusing to determine whether or not expenses incurred by the defendants in providing office facilities, furnishings, equipment, supplies and personnel in connection with the exercise by said defendants of their police power in the regulation of the practice of law, constitute expenses or debts of the state of Ohio.

(k) In failing and refusing to determine whether expenses incurred by the defendants in the exercise of the police power assumed by said defendants to exist in relation to conduct of individuals not members of the Bar, alleged to constitute the unauthorized practice of law, constitute expenses or debts of the state of Ohio.

(l) In failing and refusing to determine whether the defendants may impose upon the individual plaintiff and all members of the Bar of the state of Ohio, a

payment of an alleged fee for the purpose of providing funds to the defendants in the exercise by said defendants of an assumed authority to deal with the conduct of individuals not members of the Bar of the state of Ohio alleged to constitute unauthorized practice of law.

(m) In failing and refusing to determine whether power has been delegated by the people of Ohio in the Constitution of Ohio to the defendants to enact any rule requiring the payment of funds for public revenues or appropriating such funds to defray expenses of the state.

(n) In failing and refusing to determine whether or not the defendants, in the exercise of police power relating to the regulation of the practice of law or assumed by them to exist, in dealing with conduct allegedly constituting the unauthorized practice of law by a layman, includes an unlimited and uncontrolled right to expend whatever sums, and to employ an unlimited number of personnel, for such purposes.

(o) In failing and refusing to determine whether, although all funds received under color of office by public officers, constitute public monies within the meaning of O.R.C. 117.10, nevertheless, all funds received by the defendants and referred to in the compiaint herein, do not constitute public monies within the meaning of chapter 135 of the Ohio Revised Code."

17. In said appeal Relator Calhoun assigned the following error:

"ASSIGNMENT OF ERROR NO. 1

The court committed prejudicial error in disposing of plaintiff's complaint for declaratory judgment by

granting defendant's motion for judgment on the pleadings, without permitting discovery and without declaring what rights plaintiffs' might have under any set of facts provable under the complaint. The trial court thereby:

(a) failed and refused to declare whether there are any constitutional, statutory or other legal limits imposed upon defendants in the raising, holding and expenditure of monies; the entering of contracts, the appointment of public officers, the employment of public servants and the fixing of their terms of office, hours and compensation;

(b) failed and refused to declare whether in the raising, holding and expenditure of monies defendants are free from all external fiscal controls including the obligations of public disclosure, accounting and audit;

(c) failed and refused to declare whether, if defedants have such unlimited powers, these powers have been delegated by the people of Ohio under the Constitution of Ohio or, if not delegated, whether such powers are beyond the power of the people to retain;

(d) failed and refused to declare any other rights or obligations on the part of plaintiffs or defendants which might have been raised by the evidence."

18. In their briefs filed with the Court of Appeals, Relator Association warned the Appellate Court that the failure of the trial court to declare the rights of the parties made it impossible, on such appeal, to argue the existence of errors in the trial court's disposition of important legal issues which the trial court had, in fact, not decided; and Relator Calhoun asked that the Appellate Court not evade and ignore the issues and questions raised by the circumstances of this case by the publication of a decision addressing only those issues which the court could answer.

19. In oral argument before the Court of Appeals on October 2, 1978, the failure of the trial judge to delineate all of the rights of the parties was emphasized by counsel for Relator and counsel for Relator Association.

20. On October 26, 1978, the Court of Appeals published its decision, and on October 27, 1978, filed its Judgment Entry affirming the trial court's judgment without modification. In its decision and Judgment Entry, the Court of Appeals evaded and refused to pass on all but a few of the Assignments of Error specifically assigned and briefed by Relators. Instead, the Court of Appeals chose to answer only the first and third Assignments of Error and separate assignments 5(a), 5(b) and 5(c) filed by Relator Association. The Assignment of Error of Relator Calhoun was ignored.

21. In said decision and Judgment Entry the Court of Appeals failed and refused to pass upon the remaining errors assigned and briefed by Relators including among others:

(a) The failure of the trial court to determine and declare the facts and legal rights of the parties with reference to the numerous issues raised in the trial court;

(b) The failure of the trial court to declare whether there are any constitutional, statutory or other legal limits imposed upon the Supreme Court's powers, which are undefined and unknown because the trial court refused a trial and discovery;

(c) Whether Respondent Justices are entitled to a special immunity from all external fiscal controls including the obligations of public disclosure, accounting and audit except such as said Justices may choose to permit;

(d) Whether if the Supreme Court were free from compulsory public disclosure, accounting and audit, this constituted a special privilege and immunity in violation of Article I, Section 2 of the Constitution of Ohio;

(e) Whether the Supreme Court has the power to raise money by a levy on members of the Bar for the purpose of raising public revenue to be used in the exercise of the police power of the state;

(f) Whether the expenses incurred by defendants constituted expenses or debts of the State of Ohio;

(g) Whether the Supreme Court could raise, from members of the Bar of the State of Ohio, funds to be used in dealing with the unauthorized practice of law by laymen including an unlimited and uncontrolled right to expend whatever funds, and to employ an unlimited number of personnel, for such purposes; and

(h) Finally, whether if defendants have such unlimited powers, such powers are beyond the power of the people of Ohio to regulate.

22. The above errors were briefed in a main brief by Relator Association, encompassing twenty pages and a main brief and reply brief by Relator Calhoun encompassing fifty-one pages.

23. The Court of Appeals, by refusing and failing to pass on each Assignment of Error briefed and by failing to give its reasons for its decision as to each such error, violated the clear legal rights of Relators and the specific command of Appellate Rule 12(A) that:

> "* * * Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error."

24. Within 10 days of the filing of said Judgment Entry, Relators filed a Motion For Compliance With Rule 12(A) Of The Rules Of Appellate Procedure and Application For Reconsideration, specifically pointing out the failure of the Respondent Appellate Judges to comply with the clear requirements of Appellate Rule 12(A) with respect to the Assignments of Error set forth in Paragraphs 16 and 17 herein and briefed as set forth in Paragraph 18 herein.

25. Within 10 days of the filing of said Judgment Entry on October 27, 1978, Relators filed a Motion For Extension Of Time To File A Brief In Support Of The Motion For Compliance and Application For Reconsideration requesting until November 20, 1978, to file a brief in support thereof.

26. On November 14, 1978, Respondent Appellate Judges denied said motion for an extension of time to file briefs and, since then, have failed to act or rule upon the Motion for Compliance or the Application for Reconsideration.

27. The violation by the Court of Appeals of Appellate Rule 12(A) deprives Relators of a remedy by due course of law, administered without denial of justice, guaranteed Relators under Article I, Section 16 of the Ohio Constitution, since, in an appeal to this court, this court has the discretion to refuse to hear Relators' appeal on the grounds that their appeal involves no questions arising under the Constitution of the United States or of this State and does not involve a case of public or great general interest, without giving any reasons for such denial. This will deny to Relators a decision by any court in Ohio of the numerous issues raised and not answered in the Common Pleas Court or the Court of Appeals, and, particularly, whether Respondent Judges are free from

compulsory public disclosure, accounting and audit of their handling of public funds, except such as they choose to permit and, if not, the specific requirements and other standards by which the legality of the Supreme Court's handling can be tested.

28. On November 27, 1978, Relators duly filed with the Court of Appeals their Notice of Appeal to this court from the judgment of the Court of Appeals.

29. Relators in order to be afforded an appeal and review by this court of the decision of the Court of Appeals, are required to demonstrate that their appeal involves questions arising under the Constitution of the United States or of this State or involves a case of public or great general interest. The violation by the Court of Appeals of Civil Rule 12(A) substantially and materially impedes any such showing and deprives Relators of an adequate remedy at law because, having been given no reasons for the Appellate Court's conclusion, Relators can only speculate as to what obstacles, legal or otherwise, need be overcome in an appeal to this court, and, for the further reason, that it precludes this court from determining whether there was any merit to the claims of prejudicial error presented to the Court of Appeals by the Assignments of Errors, which this court requires as a predicate for such appeal.

30. That Respondent Appellate Judges have a clear duty and obligation to comply with Rule 12(A). Such compliance is not discretionary and cannot be compelled by any process or procedure available to the Relators other than by the issuance of the writ prayed for.

WHEREFORE, Relator Crede Calhoun and Relator The Cuyahoga County Bar Association pray:

(1) That Respondent Justices of the Supreme Court disqualify themselves and that this action be determined by seven judges of the Courts of Appeals chosen by lot;

(2) That they be afforded oral argument of this action;

(3) For a Writ of Mandamus directing Respondents Robert E. Holmes, Archer E. Reilly and John W. McCormac to comply with Appellate Rule 12(A) by specifically passing upon, in writing, Relator Cuyhoga County Bar Association's Assignments of Error numbers 2, 4, 5, 5(d), 5(e), 5(f), 5(g), 5(h), 5(i), 5(j), 5(k), 5(l), 5(m), 5(n) and 5(o) and by passing upon Relator Calhoun's first Assignment of Error stating the reasons for the court's decision as to each such error;

(4) For such other relief, as may be appropriate, under the facts shown at the trial of this matter; and

(5) That Relators recover their costs herein.

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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-294

CREDE CALHOUN,

Petitioner,

v.

ROBERT E. HOLMES, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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INDEX

Page No.

Statement Of The Case 1, 2

Reasons Why The Writ Should Be Denied

1. Petitioner failed to present his federal claims to the state court for determination 2, 3

2. Petitioner is precluded from relitigating his claim that respondents' interest in the proceeding required them to disqualify themselves 3, 4

3. The issues are not important enough to warrant review 4, 5

Conclusion 6

Appendix A *(Buschbacher, et al.* v. *Supreme Court, et al.)* .1a to 7a

Appendix B *(Calhoun, et al.* v. *Supreme Court, et al.)* . . 1b to 11b

CITATIONS

Page No.

CASES

Adams v. *Russell*, 229 U.S. 353 (1913) 2

Buschbacher v. *Supreme Court of Ohio* 1, 4

Calhoun v. *Supreme Court of Ohio* 2, 5

Campbell v. *Rankin*, 99 U.S. 261 (1879) 4

Cuyahoga County Bar Assn. v. *Supreme Court of Ohio*, 430 U.S. 901 (1977) 1, 4

Gryger v. *Burke*, 334 U.S. 728 (1948) 4

Lippert v. *Engle*, 52 Ohio St.2d 67 (1977) 3

Live Oak Water User's Assn. v. *Railroad Comm.*, 269 U.S. 354 (1926) 3

Lynch v. *New York ex rel. Pierson*, 293 U.S. 52 (1934) 2, 3

Mississippi Pub. Corp. v. *Murphree*, 326 U.S. 438 (1946) 5

F. G. Oxley Stave Co. v. *Butler County, Missouri*, 166 U.S. 648 (1897) 2

Snowden v. *Hughes*, 321 U.S. 1 (1944) 4

State ex rel. Board of Tax Appeals v. *Morgan County Budget Comm.*, 174 Ohio St. 297 (1963) 3

State ex rel. Long v. *Bettman*, 24 Ohio St.2d 16 (1970) 3

State ex rel. Pressley v. *Indus. Comm.*, 11 Ohio St.2d 141 (1967) 3

Stembridge v. *Georgia*, 343 U.S. 541 (1952) 3

Withrow v. *Larkin*, 421 U.S. 35, 47 (1975) 4

STATUTES

Section 141.04, Ohio Revised Code 5

OTHER AUTHORITIES

1B Moore, *Federal Practice*, 377, ¶0.441[2] 4

Restatement, *Judgments*, §69(1) (1942) 4

Restatement, 2d *Judgments*, §68 (Tent. Draft No. 4, 1977) 4

Rule 12(A), Ohio Rules of Civil Procedure 2, 4

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This proceeding is the latest in a series of cases instituted by the petitioner against the Supreme Court of Ohio challenging the validity of rules adopted by that court which provide for the registration of attorneys and the payment of a registration fee.

Petitioner first instituted suit in the United States District Court for the Northern District of Ohio claiming that the rules were invalid under both state and federal law. The court found that venue was improper in that district and transferred the case to the Southern District, where two other actions challenging the same rules on similar grounds, were pending.

The District Court, by judgment entered October 13, 1976, dismissed petitioner's two actions. *Buschbacher* v. *Supreme Court of Ohio*. The court reviewed each of the federal claims and found them without merit. It refused to take jurisdiction over the state law claims. The opinion of the District Court is unreported. It is set forth as Appendix A to this brief.

The judgment of the District Court was affirmed by this Court. *Cuyahoga County Bar Assn.* v. *Supreme Court of Ohio*, 430 U.S. 901 (1977).

Petitioner then instituted suit in state court challenging the validity of the rules under state law. The trial court found the state law claims to be without merit and dismissed the action. The judgment of the trial court was affirmed by the Court of Appeals. *Calhoun* v. *Supreme Court of Ohio*. The opinion of the Court of Appeals has not yet been reported. It is set forth as Appendix B to this brief.

A motion to certify the record was overruled by the Supreme Court of Ohio on April 5, 1979. Petitioner did not elect to seek review in this Court.

Petitioners instituted the instant case in the Supreme Court of Ohio alleging that the Court of Appeals had failed to comply with Rule 12(A) of the Ohio Rules of Appellate Procedure. A portion of the rule is set forth in the petition. It provides in pertinent part that all errors assigned and briefed shall be passed upon by the court. Petitioner requested a writ of mandamus requiring the Court of Appeals to comply with Rule 12(A) and requiring the members of the Supreme Court of Ohio to disqualify themselves.

The Supreme Court of Ohio, on April 26, 1979, sustained a motion to dismiss and dismissed the cause.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioner failed to present his federal claims to the state court for determination.

In order to invoke the jurisdiction of this Court to review the judgment of the Supreme Court of Ohio, petitioner must show that he presented his federal claims to the state court. *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934); *Adams* v. *Russell*, 229 U.S. 353, 360-361 (1913); *F. G. Oxley Stave Co.* v. *Butler County, Missouri*, 166 U.S. 648, 654-655 (1897).

Petitioner did not present his federal claims to the state court for determination. The complaint which petitioner filed in that court is set forth in his petition (pp. A-3 *et seq.*). It contains no mention of any federal claim.

Petitioner claims that the federal claims were raised in the brief of amicus curiae. Even if the claims of third persons, might under some circumstances, enable a petitioner to invoke the jurisdiction of this Court, they would not do so in this case. A claim of jurisdiction cannot be sustained by reference to arguments in the briefs. *Lynch* v. *Pierson, supra*, 293 U.S. at 54; *Live Oak Water User's Assn.* v. *Railroad Comm.*, 269 U.S. 354, 358-359 (1926).

Petitioner is also unable to show that the state court judgment does not rest upon an adequate non-federal ground. Petitioner instituted suit in the Supreme Court of Ohio seeking a writ of mandamus. In order to justify this extraordinary remedy, petitioner was required to show some definite, specific and absolute legal duty imposed upon and violated by the respondents. *State ex rel. Long* v. *Bettman*, 24 Ohio St.2d 16, 17 (1970); *State ex rel. Board of Tax Appeals* v. *Morgan County Budget Comm.*, 174 Ohio St. 297, 299 (1963). He was also required to show that he had no adequate remedy in the ordinary course of the law. Paragraph 3 of the syllabus of *State ex rel. Pressley* v. *Indus. Comm.*, 11 Ohio St.2d 141 (1967); *Lippert* v. *Engle*, 52 Ohio St.2d 67 (1977).

Petitioner's complaint (Pet. A-3 *et seq.*) alleges no facts which show that the respondents violated any legal duty. It also fails to allege facts which show that he did not have an adequate remedy by way of appeal from the judgment of the state court of appeals. The Supreme Court of Ohio would, therefore, have been justified in dismissing his complaint on either, or both, of these grounds.

In this situation, where the judgment might have rested on an adequate non-federal ground, this Court has stated that it will not take jurisdiction to review the judgment. *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952); *Lynch* v. *New York ex rel. Pierson, supra*, 293 U.S. at 54-55.

2. Petitioner is precluded from relitigating his claim that respondents' interest in the proceeding required them to disqualify themselves.

The question of whether the members of the Supreme Court of Ohio constituted a fair and impartial tribunal was litigated in, and determined by, the District Court.

In the action which petitioner instituted in federal court, he argued that he would be denied his due process right to a fair hearing before an impartial tribunal if he were to present his objections to the

registration fee to the Supreme Court of Ohio because of that court's interest in maintaining and managing the fund resulting from the collection of such fees.

The District Court rejected the argument and found that the Supreme Court of Ohio would be a fair and impartial tribunal. *Buschbacher* v. *Supreme Court of Ohio, supra,* (App. 3a to 4a hereto).

The judgment of the District Court was affirmed by this Court. *Cuyahoga County Bar Assn.* v. *Supreme Court of Ohio, supra,* 430 U.S. 901.

Petitioner is precluded by the doctrine of collateral estoppel from relitigating, in this proceeding, the question of whether the members of the Supreme Court of Ohio are a fair and impartial tribunal to determine his claims. *Campbell* v. *Rankin,* 99 U.S. 261, 263 (1879); Restatement, *Judgments,* §69(1) (1942); Restatement, 2d *Judgments,* §68 (Tent. Draft No. 4, 1977); 1B Moore, *Federal Practice,* 377, ¶0.441[2].

3. The issues are not important enough to warrant review.

Petitioner claims that his due process rights were violated because the members of the state supreme court did not disqualify themselves and because the state court of appeals did not comply with the state appellate rules.

Respondents submit that an examination of the opinion of the state court of appeals, set forth as Appendix B hereto, shows that the court did pass upon each of the assignments of error in compliance with the provisions of Rule 12(A). Even if it failed to do so, however, it would not present a federal claim. The failure to follow the applicable state law does not violate any federally protected right. *Gryger* v. *Burke,* 334 U.S. 728, 731 (1948); *Snowden* v. *Hughes,* 321 U.S. 1, 11 (1944).

Petitioner did name the individual members of the state supreme court as parties to the mandamus proceeding. This is not a sufficient basis, however, for them to disqualify themselves. The only allegation concerning these respondents is that they were the duly elected members of that court. This falls far short of the personal abuse or criticism which would create a constitutionally impermissible probability of actual bias. *Compare Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975).

These respondents have no official or financial interest in the subject matter of the mandamus proceeding. The only issue presented in that proceeding is whether the court of appeals followed the state rules of appellate procedure.

Petitioner claims that these respondents have an interest in the fund resulting from the collection of registration fees. The registration fee is the subject matter of a related action. *Calhoun* v. *Supreme Court of Ohio, supra,* App. B hereto. Respondents submit that the question of whether they should disqualify themselves should have been raised in that case rather than the instant case.

In any event, however, any interest which these respondents might have in the registration fees is not sufficient to create the probability of actual bias. Some of these respondents were members of the court at the time the court adopted the rule providing for registration fees. This does not mean that these respondents would not be a fair and impartial tribunal to determine the validity of that rule.

This Court adopted the Federal Rules of Civil Procedure. This did not prevent it from determining the validity of such rules. *Mississippi Pub. Corp.* v. *Murphree,* 326 U.S. 438, 444 (1946).

Respondents have no personal financial interest in the money derived from the registration fees. It has no effect on the amount of their compensation and no portion of that compensation is paid from the registration fees. The compensation of the members of the state supreme court is set by the state legislature and is paid from the state treasury. Section 141.04 of the Ohio Revised Code.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 1979, three copies of the Respondents' Brief in Opposition were sent by United States first class mail, postage prepaid, to Crede Calhoun, 408 Mall Building, 118 St. Clair Avenue, N.E., Cleveland, Ohio 44114, Pro Se. I further certify that all parties required to be served have been served.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

MICHAEL S. BUSCHBACHER, ET AL.,
Plaintiffs,

v.

SUPREME COURT OF OHIO, ET AL.,
Defendants.

C-2-75-743
C-2-75-751
C-2-76-309

OPINION

Before John W. Peck, Circuit Judge and Joseph P. Kinneary and David S. Porter, District Judges.

Kinneary, District Judge. Plaintiffs in these actions assert the unconstitutionality of Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio which requires practicing attorneys to pay a biennial $50.00 registration fee used to maintain a fund for the investigation of professional misconduct. The claims for relief are alleged to arise under 42 U.S.C. §1983, and this Court has jurisdiction under 28 U.S.C. §1343(3), (4). On July 9, 1976, a three judge court was convened pursuant to 28 U.S.C. §§2281, 2284, to determine the issues presented in these actions.

This matter is now before the Court on the motions of the defendants to dismiss the complaints.

Plaintiffs in these three cases are Michael S. Buschbacher, Thomas A. Schaffer, Daniel D. Connor and Crede C. Calhoun, all attorneys admitted to the practice of law in Ohio, and the Cuyahoga County Bar Association, a non-profit corporation organized under the laws of the State of Ohio.

Defendants are the Supreme Court of Ohio, Chief Justice C. William O'Neill, and the associate justices of the Supreme Court of Ohio.

Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio requires attorneys to register biennially with the Clerk of the Supreme Court of Ohio and to pay a registration fee of $50.00. If an attorney fails to register a pay the fee, he is not "entitled to practice law or hold himself out as authorized to practice law or hold judicial office" in Ohio. Rule VII(6); Rule VIII. The fund generated by the registration fee is used to pay the expenses of the Board of Commissioners of the Unauthorized Practice of Law and the Grievance Committees of local bar associations.

The complaints allege substantially identical claims for relief. Plaintiffs maintain that Rule VII deprives them of procedural and substantive due process rights, denies them equal protection of the law and interferes with their freedom to associate with other attorneys. Plaintiffs further contend that the Supreme Court of Ohio acted in contravention of state law in promulgating Rule VII. Finally, plaintiffs in C-2-75-743 allege that Article IV, Section 5 of the Ohio Constitution is void for vagueness. Each of these claims for relief will be considered below.

Procedural Due Process

Plaintiffs allege that Rule VII violates the due process clause both because it provides no notice that failure to pay the registration fee will automatically result in an attorney's suspension, and because there is no provision for a hearing. Further, plaintiffs contend that if a hearing is in fact held, there is ultimately no fair and impartial tribunal within the state, since the Supreme Court of Ohio, the body adopting the rule and establishing its enforcement machinery, is the ultimate decision-maker.

Plaintiffs have no standing to assert the notice claim. At the time the suit was filed and the causes of action are alleged to have arisen, each plaintiff knew of his obligation to pay the registration fee and the consequences of nonpayment. Plaintiff Cuyahoga County Bar Association alleges neither that any of its members were without notice of Rule VII nor that any of its members have acted to their detriment. Consequently, there is no case or controversy between plaintiffs and defendants with respect to the question of notice. *See Warth* v. *Seldin,* 422 U.S. 490 (1975); *O'Shea* v. *Littleton,* 414 U.S. 488 (1974).

Plaintiffs' contention that the Rule denies them their due process right to a hearing is without merit. Rule V of the Supreme Court Rules for the Government of the Bar of Ohio provides for notice and hearing prior to suspension or disbarment from the practice of law and the Constitution does not require a hearing prior to the act which gives rise to the disbarment proceeding.

Plaintiffs further argue that they are in any event denied a fair hearing under Rule V because the Supreme Court of Ohio, the ultimate decision-maker, has an interest in maintaining and managing the fund created by the operation of its own Rule VII. While it is true that a fair and impartial decision-maker is required when interests afforded procedural protection by the due process clause are at stake, the decision-maker need not be devoid of all possible bias. There is, furthermore, a presumption in favor of the honesty and integrity of the decision-maker, and the plaintiffs have a heavy burden of showing a substantial risk of actual bias. *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975).

In this country, state supreme courts are generally charged with the responsibility of establishing and administering disciplinary rules for the regulation of the practice of law. Furthermore, it is normal for state supreme courts to assess fees in order to effectuate the administration of that responsibility. *See, e.g., May* v. *Supreme Court of Colorado,* 508 F.2d 136 (10th Cir. 1974); *Cantor* v. *Supreme Court of Pennsylvania,* 353 F.Supp. 1307 (E.D. Pa. 1973) *affirmed,* 487 F.2d 1394 (3d Cir. 1973); *Berberian* v. *Rhode Island Bar Association,* No. 74-1030 (1st Cir. April 3, 1974) (unreported decision); *In re Reed,* 257 A.2d 382 (Del. 1969); *Petition of Florida State Bar Association,* 40 So.2d 902 (Fla. S. Ct. 1949); *Wallace* v. *Wallace,* 225 Ga. 102, 166 S.E.2d 718, 723-25 (1969); *In re Unification of the Bar of Hawaii,* 432 P.2d 887 (Haw. 1967); *Ayers* v. *Hadaway,* 303 Mich. 589, 6 N.W.2d 905, 907-08 (1942); *Sharood* v. *Hatfield,* 296 Minn. 416, 210 N.W.2d 275 (1973); *Application of President of Montana Bar Association,* 518 P.2d 32 (Mont. 1974); *In re Platz,* 60 Nev. 295, 108 P.2d 858, 864 (1940); *In re Unification of New Hampshire Bar,* 248 A.2d 709 (N.H. 1968); *In re Gibson,* 4 P.2d 643, 649 (N. Mex. 1931); *Sweeney* v. *Cannon,* 380 N.Y.2d 633, 282 N.E.2d 332 (1972); *In re Integration of State Bar of Oklahoma,* 185 Okla. 505, 95 P.2d 113 (1939); *Bennett* v. *Oregon State Bar,* 470 P.2d 945 (Ore. 1970). The mere fact that it was the Supreme Court of Ohio that imposed the registration fee does not render that court a biased forum for the determination of whether or not an attorney should be disciplined for failure to pay the fee. Likewise, the Supreme Court's control over the investigation and prosecution of disciplinary charges does not render it an inappropriate tribunal.

In reaching this conclusion, this Court is guided by the decisions of the Supreme Court of the United States in *Withrow* v. *Larkin, supra,* where a state medical board which combined investigatory and adjudicatory functions was held to be an impartial tribunal and in *Hortonville Joint School District No. 1* v. *Hortonville Education Association,* ___ U.S. ___ (June 17, 1976), in which a school board embroiled in a dispute with a teacher's association was held to be a fair tribunal for the determination of whether or not a teacher should be discharged. The Court is therefore of the opinion that the Supreme Court of Ohio is a fair and impartial tribunal to finally adjudicate disciplinary action taken under Rule V for failure to pay the fee required by Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio.

Finally, plaintiffs argue that the methods employed by the Supreme Court of Ohio in adopting Rule VII did not comport with due process. Plaintiffs allege, however, no facts in support of their contention and this Court is of the opinion that the Supreme Court of Ohio duly followed established procedures for the adoption of a Rule for the Government of the Bar of Ohio. The due process clause requires no more. *Cf. In re Reed, supra.*

Substantive Due Process

Plaintiffs assert that they have been granted a right to practice law that cannot be infringed upon or denied to them by the imposition of a registration fee designed to generate financing for the policing of the profession. Relying upon *Bradley* v. *Fisher,* 80 U.S. 335 (1871), *Ex parte Bradley,* 74 U.S. 364 (1868), and *Ex parte Garland,* 71 U.S. 333 (1866), plaintiffs argue that they cannot be deprived of the right to practice law except for moral or professional delinquency.

These cases are inapposite to the proposition for which they are cited. The *Bradley* cases involved the disbarment by a federal court of the attorney representing John H. Surratt in his trial for the murder of President Lincoln. The attorney, Bradley, was alleged to have rudely accosted and threatened the trial judge. In *Ex parte Bradley, supra,* the Supreme Court held that although the courts have the undoubted power to punish attorneys for misconduct, an attorney cannot be disbarred without notice and opportunity to defend. 74 U.S. at 374. The Supreme Court held in *Bradley* v. *Fisher, supra,* that the trial judge was immune from suit by Bradley. *Ex parte Garland* was a suit by an attorney for his re-admission to the practice of law in a federal court without taking an oath that he had not held an office under the Confederate government. Garland had held a Confederate office, but after the Civil War he had received a Presidential pardon. In the course of holding that the oath was an *ex post facto* law inflicting punishment for treason, the Supreme Court stated that an attorney can be deprived of the right to practice his profession only for "moral or professional delinquency." 71 U.S. at 379. These cases do not, in the view of this Court, stand for the proposition that courts are prohibited from establishing reasonable rules for the governance of the bar, including the assessment of a fee in order to effectuate those rules. In any event, failure to comply with reasonable rules for the governance of the bar is surely an act of professional delinquency.

At base, plaintiffs argue that once they are admitted to the bar, the Supreme Court of Ohio can adopt no rule the noncompliance with which would deprive them of the right to practice law. This proposition is supported by neither logic nor case law and the constitutionality of an assessment imposed for the first time subsequent to an attorney's admission to the bar is beyond question. *See In re Reed,* 396 U.S. 274 (1970); *Lathrop* v. *Donohue,* 367 U.S. 820 (1961). Thus, plaintiffs' argument that the registration fee is unconstitutional because it was imposed as a condition of practicing law subsequent to their admission to the bar is without merit.

In short, plaintiffs cannot succeed in their substantive due process claim unless they show that there is no rational connection between Rule VII and defendants' interest in regulating the bar. *See Kelley* v. *Johnson,* 44 U.S.L.W. 4469, 4472 (April 5, 1976); *North Dakota State of Pharmacy* v. *Snyder's Drug Store,* 414 U.S. 156, 164-67 (1973); *Ferguson* v. *Skrupa,* 372 U.S. 726, 730-32 (1963). The Supreme Court of Ohio has the duty to limit the practice of law to those professionally and morally qualified, and the registration fee is intended to generate a fund to finance the accomplishment of that end. There is, consequently, a rational relationship between the fee and the Supreme Court's duty of regulating the practice of law.

Equal Protection

Attorneys employed by the federal government are not required to pay a registration fee and plaintiffs contend that this exception to the application of the operation of Rule VII deprives them of the equal protection of the laws. In the area of social and economic welfare, discrimination by the state does not violate the equal protection clause if that discrimination is reasonably related to a legitimate state purpose. *Mourning* v. *Family Publications Services, Inc.,* 411 U.S.

356, 369 (1973). Defendants suggest that the exemption of federal employees promotes the legitimate state purposes of maintaining harmonious relations and of avoiding needless friction between the state and federal governments. *Cf. Railroad Commission* v. *Pullman Company*, 312 U.S. 496, 500-01 (1941). Plaintiffs advance no countervailing argument and this Court concludes that the Rule VII exemption is rationally related to a legitimate state purpose.

Void For Vagueness

Plaintiffs in C-2-75-743 contend that Article IV, Section 5 of the Ohio Constitution is void for vagueness. That portion of the Ohio Constitution provides in part that

> [t]he Supreme Court . . . shall make rules governing the admission to the practice of law and discipline of persons so admitted. . . .

Because they contain broad grants of authority, constitutions employ general language and are not intended to be narrowly drawn codes. There is nothing vague about Article IV, Section 5. It empowers[1] the Supreme Court of Ohio to regulate admission to the bar and to administer discipline, and courts generally have assumed such authority with or without constitutional sanction. *See, e.g., Ex parte Garland, supra*, 71 U.S. at 379; *Ex parte Bradley, supra*, 74 U.S. at 374.

Rule VII itself is narrowly drawn and affords to plaintiffs all the protection mandated by the First and Fourteenth Amendments against overbroad restrictions on speech and association.

Freedom Of Association

Plaintiffs further contend that suspension for failure to pay the registration fee will result in the unconstitutional deprivation of the freedom to associate with fellow attorneys. Disbarment would, of course, terminate the privileges associated with the practice of law. However, the limitation of associational rights would flow, not from any constitutional infirmity in Rule VII, but rather from the attorney's own failure to comply with the Rules for the Government of the Bar of Ohio. Because Rule VII is constitutionally sound, plaintiffs have no claim for relief based on the First Amendment's protection of the right to freedom of association.

[1]The Supreme Court of Ohio has held that it has the inherent judicial authority to control admission to the bar and to discipline its members. *In re Nevius*, 174 Ohio St. 560, 562-63 (1963).

Pendent State Law Claim

Finally, plaintiffs allege that the adoption of Rule VII by the defendants is contrary to state law. This is a pendent claim, of course, which this Court may in its discretion refuse to consider. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Admission to the bar and discipline of attorneys are traditionally matters within the exclusive jurisdiction of the court of whose bar the attorney is a member. Each jurisdiction has its own rules and practices and for this Court to substitute its judgment for that of the Supreme Court of Ohio in a matter so intimately involving that court's authority and jurisdiction would be peculiarly inappropriate. Plaintiffs should seek resolution of their state law questions in the state forum.

APPENDIX B

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

CREDE CALHOUN, ET AL.,
Plaintiffs-Appellants,

v.

SUPREME COURT OF OHIO, ET AL.,
Defendants-Appellees.

Case No. 78AP-177

DECISION

Rendered on October 26, 1978

HOLMES, P. J.

This matter comes before the court on appeal from a judgment on the pleadings rendered by the Franklin County Court of Common Pleas for defendants Supreme Court of Ohio and the justices of that court, and for Mr. Thomas Startzman, the clerk of such court. Plaintiffs below, appellants in this court, sought a declaratory judgment on numerous issues relating to the constitutional and statutory power of the defendants to promulgate rules to levy attorney registration fees and to maintain a fund for regulating the practice of law in the state.

The facts in brief giving rise to this action, and to this appeal, are that the Supreme Court of Ohio adopted Rule VII of the Rules for the Government of The Bar (Gov. R. VII), effective October 25, 1975. This rule provides for the registration of all attorneys in the state and for the biennial payment of a registration fee of fifty dollars.

At the time of adopting Gov. R. VII, The Supreme Court also amended Rule V. This amendment provides for the creation of the office of disciplinary counsel. The disciplinary counsel aids local bar associations in investigations of alleged misconduct, and also has the responsibility to take over investigations of misconduct which have not been completed within a specified time.

Funds for the compensation of staff and for the operations of the office of disciplinary counsel are provided from the registration fees collected pursuant to Gov. R. VII.

The Supreme Court also adopted Gov. R. VIII, which rule created the Board of Commissioners on the Unauthorized Practice of Law. The rule provides for the procedures for processing complaints alleging unauthorized practice of law. The rule also provides that the expenses incurred by local bar associations in handling the complaints shall be paid from the registration fees collected pursuant to Gov. R. VII.

Plaintiff-appellant Cuyahoga County Bar Association instituted an action in the federal district court against the defendants in this action, claiming that the rules concerned with herein were unconstitutional. Plaintiff Crede Calhoun, a practicing attorney, was made a party to such action. A three-judge court found that the constitutional objections to the rules were without merit, and that the rules were in compliance with provisions of the federal Constitution. The federal court noted that the plaintiffs had alleged that the adoption of the rules was contrary to state law, and found that such was "a pendent claim" which that court had discretion to refuse to consider. Accordingly, the court declined to exercise pendent jurisdiction, and dismissed that federal action on the basis that the complaint failed to state a claim upon which relief could be granted. The judgment of the district court was affirmed by the Supreme Court of the United States in *Cuyahoga County Bar Assn.* v. *Supreme Court of Ohio* (1977), 97 S.Ct. 1167.

The plaintiffs Cuyahoga Bar Association and Crede Calhoun thereafter brought this action in the Franklin County Court of Common Pleas, seeking a declaratory judgment on numerous issues which questioned the constitutional and statutory powers of the defendant Supreme Court to levy the aforestated attorney registration fees, and to maintain a fund for regulating the practice of law in the state.

The gravamen of the plaintiffs' complaint is that defendants, in promulgating and enforcing Rules V, VII and VIII of the Rules for The Government of The Bar, have enacted a tax upon attorneys in order to raise public revenue to create a fund to defray expenses of the state; that the defendants have established a state agency, and appointed public officers and employees; that the defendants have appropriated revenue of the state, and have not paid such collected funds into the state treasury, contrary to the requirements of R.C.

131.01 and R.C. 131.07; and, that the defendants have exercised all of these powers absolutely and without limitation.

It is further contended that the exercise of these powers by the defendants violates numerous provisions of the Ohio Constitution and several statutes of the state. Plaintiffs additionally claim that defendants are acting contrary to the provisions of Article IV, section 5 of the United States Constitution, as well as in violation of the due process and equal protection clauses of the Fourteenth Amendment.

Subsequent to the filing of the complaint, defendants filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Civ. R. 12(B) (1). The trial court denied the motion, holding that R.C. Chapter 2721 conferred upon the court jurisdiction to render a declaratory judgment on the issues raised by the complaint, and rejecting defendants' contention that the Supreme Court's jurisdiction over matters relating to the practice of law is exclusive. In accordance with this ruling, the court instructed defendants to file an answer to the complaint.

Defendants' answer sets forth five defenses. In the first, defendants admit many of the factual allegations of the complaint, but deny plaintiffs' right to a judgment in their favor as a matter of law. The second defense is a reassertion of the earlier contention that the trial court lacks subject matter jurisdiction over the issues raised in the complaint. In their third defense, defendants claim that the federal constitutional issues raised by plaintiffs are barred by the doctrine of *res judicata*. Finally, the fourth and fifth defenses assert that plaintiffs have failed to state a claim upon which relief may be granted.

The issues having been joined by the submission of all pleadings, defendants moved for judgment on the pleadings under Civ. R. 12(C). The trial court granted the motion "for the reasons contained in the opinion of the court which was read into the record on February 10, 1978."

The court's opinion, which was incorporated by reference in the judgment entry, holds that the Ohio Supreme Court has the inherent power to promulgate rules regulating the practice of law, and that where these rules conflict with statute the rules prevail. The court further determined that R.C. 131.01 and R.C. 131.07 do not apply to the attorney registration fees assessed by the Supreme Court. The trial court found that issues of fact remained in the pleadings, but that

none of these disputed facts were material to the fundamental issues in the case. On the basis of these holdings, the court concluded that "reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for judgment on the pleadings was made."

In appellant Cuyahoga County Bar Association's first assignment of error it is argued that:

> "The Court erred in attempting to dispose of this action, being an action for a declaratory judgment, by rendering a judgment on the pleadings."

It is urged that a judgment on the pleadings in an action for declaratory judgment has absolutely no legal effect.

Although it is true that an action for declaratory judgment seeks no recovery other than a declaration of the legal rights and relations of the parties, this does not preclude a court from granting judgment on the pleadings in appropriate circumstances. The cases cited by appellants in this regard are distinguishable.

In *Bruckman* v. *The Bruckman Co.* (1938), 60 Ohio App. 361, cited by appellants, defendant demurred to plaintiff's petition for declaratory judgment. The trial court dismissed the action for failure to state a cause of action. The judgment was reversed on appeal, the court holding that dismissal of a declaratory judgment action for failure to state a cause of action is appropriate only where the plaintiff has failed to bring himself within the provisions of the declaratory judgment statutes. The court found that plaintiff had stated a claim under the declaratory judgment provisions of the General Code and therefore was entitled to prevail against the demurrer.

The instant case is distinguishable from *Bruckman,* in that a judgment on the pleadings is generally a decision on the merits, while dismissal for failure to state a claim constitutes a finding that the statement of the claim for relief is insufficient on its face. 5 Wright & Miller, Federal Practice and Procedure, sec. 1349, 1367 (1969). The *Bruckman* court seemingly recognized this distinction when it stated that:

> "The court in the instant case wrote a very comprehensive and, in our opinion, accurate decision upon the merits of the plaintiff's contention, finding against him. If such findings had been incorporated in a *judgment after proper pleadings,* the rights of the plaintiff in the matter would have been properly considered." (Emphasis added.)

Appellants also cite *Alsop* v. *Heater* (1975), 45 Ohio App.2d 201, in support of the proposition that judgment on the pleadings is improper in an action for declaratory judgment. That case, however, merely holds that if a justiciable issue has been raised in a declaratory action, then it is inappropriate to grant a directed verdict without declaring the rights and relations of the parties.

That judgment on the pleadings is appropriate under certain circumstances in an action for declaratory judgment is apparent from a reading of Civ. R. 57, which states in part that:

> "The procedure for obtaining a declaratory judgment pursuant to sections 2721.01 to 2721.15, inclusive, of the Revised Code, shall be in accordance with these rules."

We hold that judgment on the pleadings may be granted pursuant to Civ. R. 12(C) in an action for declaratory judgment where there exists no material issue of fact and one party is entitled to a declaration in his favor as a matter of law. See Borchard, Declaratory Judgments, 2d Edition, at page 432; 22 American Jurisprudence 2d, Declaratory Judgments, section 93. Appellant Bar Association's first assignment of error is hereby dismissed.

In appellant Bar Association's third assignment of error it is contended that:

> "The Court erred in undertaking to dispose of this action for a declaratory judgment by a judgment on the pleadings when there are important issues of fact between the parties, the determination of which requires consideration of substantial evidence which the plaintiffs were prevented from presenting."

If it is true, as urged by appellants, that there existed issues of fact material to the disposition of this case, then judgment on the pleadings was improper, and the cause must be remanded for a trial on the merits. *George C. Frey Ready-Mixed Concrete, Inc.* v. *Pine Hill Concrete Mix Corp.* (2d Cir. 1977), 554 F.2d 551, 553. Determination of this issue requires an examination of the allegations set forth in the complaint.

The allegations constituting the complaint in this action continue at length for some sixteen pages. In the interest of brevity, detailed discussion of the allegations will be confined to several significant portions of the complaint. Most of the issues raised concern the defendants' rights, under the Ohio Constitution, to assess attorney

registration fees, and to maintain a fund for the regulation of the practice of law. Because these issues may be decided by judicial construction of constitutional and statutory provisions, they present issues of law, and are susceptible of summary treatment by the court.

Also the issue of whether R.C. 131.01 and R.C. 131.07 are applicable to the fees collected pursuant to Gov. R. V, and whether such fees must be paid into the state treasury, is also a question of law and could be determined by the trial court upon a motion for judgment upon the pleadings.

We now turn to the matter of whether the trial court was correct in its determination of the legal issues presented here. Historically, the Supreme Court of Ohio has, through the exercise of its "inherent powers," concerned itself with the matters related to the control of the practice of law. By way of Rule XIV of the Supreme Court Rules of Practice, it had provided for the procedures for admission to the bar and, as of January 1901, had established the board of bar examiners. By rule of practice XXVII, the Supreme Court, in January 1957, created the board of commissioners on grievances and discipline for the review of complaints of misconduct of attorneys and judges. The work of this board in the furtherance of disbarment, removal, and disciplinary procedures has proceeded to operate in such areas of concern since its creation, and until the adoption of Gov. R. VIII.

The practice of the Supreme Court of adopting rules which imposed assessments within the general area of the control of the practice of law is also well established. Section 6 of Rule XIV, of the rules of the Supreme Court, provided that every law student must file an application for registration as a candidate for admission to the bar and pay a registration fee of ten dollars. Section 12 of those rules provided that every applicant for examination must pay an examination fee of thirty dollars. This requirement of registration and examination fees has been in effect since June 7, 1923.

By case law, it has long been held that the Supreme Court has the "inherent power" to regulate the practice of law in the state. In the case of *In re Thatcher* (1909), 80 Ohio St. 492, the Supreme Court, construing its jurisdiction over disciplinary proceedings involving the disbarment of attorneys, held in the syllabus as follows:

> "1. The Supreme Court of Ohio has inherent jurisdiction of proceedings to disbar an attorney, resulting as an incident of its organization as a court, as well as from its power to admit to the bar.
>
> "2. The provisions of Section 563, Revised Statutes, are not an attempted enlargement of the jurisdiction of the several courts therein named, in contravention to the constitution, but are regulative provisions recognizing already existing powers of the courts.
>
> "***"

In the same regard as to the Supreme Court's interpretation of its own jurisdiction relative to matters of the practice of law, see *In re Nevius* (1963), 174 Ohio St. 560, and *Cleveland Bar Assn.* v. *Pleasant* (1958), 167 Ohio St. 325.

In Ohio, this inherent power to regulate and define the practice of law has been embodied in the Modern Courts Amendment of 1968, now Article IV, section 2(B) (1) (g) of the Ohio Constitution. Within the staff comments relative to such proposed amendment to the Constitution, to be found in the Ohio Legislative Service Commission Staff Research Report, Number 75, entitled Problems of Judicial Administration, we find the following:

> "The court is given authority over admission to the practice of law, the discipline of persons admitted to practice, and over all other matters relating to such practice. While this authority is now exercised by the Supreme Court, the committee received considerable testimony, both pro and con, as to whether this was part of the inherent power of the court or whether such authority should be conferred by the Constitution. Committee consensus was that it should be so included."

The rules questioned herein followed the passage of the Modern Courts Amendment to the Ohio Constitution, such rules being deemed necessary by many within the legal profession in order to aid and improve the procedures for professional discipline, with the aim of achieving the highest possible professional conduct, and to protect the public from unethical conduct. The determination to assess a fee from all attorneys in the state was based on the recognized need to obtain the services of a professional staff to investigate complaints of misconduct throughout the state. Prior to the present rules, the investigations were conducted by practicing attorneys throughout Ohio who, through their dedicated and sincere service, involved themselves in many, many hours of investigation and report drafting in these disciplinary cases. The need for a professional staff to relieve practicing attorneys of such responsibility was well documented.

While there is no case law from this state addressing the issue of the Supreme Court's power to raise and maintain a fund for the purpose of regulating the practice of law, such funds have been upheld in other jurisdictions on the basis that they are necessary incidents to a court's inherent power to regulate the bar. *Petition of Florida State Bar Assn.* (1949), 40 So.2d 902. Also see *Ayres* v. *Hadaway* (1942), 303 Mich. 589, 6 N.W.2d 905; *Matter of Washington State Bar Assn.* (1976), 86 Wash.2d 624, 548 P.2d 310.

In the case of *Petition of Florida State Bar Assn., supra,* the court, among other issues, considered whether the power to "integrate" or to uniformly register all members of the bar of the state of Florida carried with it the power to impose a membership fee for the support of bar integration activities. The court, in answer to such issue, stated as follows within its opinion:

> "A membership fee in the bar association is an exaction for regulation only, while the purpose of the tax is revenue. In City of Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L.R.A. 69, 23 Am. St. Rep. 558, this distinction was recognized. It was also recognized in United States v. Butler, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914. These cases also recognize the rule that the power to regulate may carry with the imposition of a charge for that purpose. If the judiciary has inherent power to regulate the bar, it follows that as an incident to regulation it may impose a membership fee for that purpose. It would not be possible to put on an integrated bar program without means to defray the expense. We think the doctrine of implied powers necessarily carries with it the power to impose such an exaction."

We are in agreement with the Florida Supreme Court and other courts which have held that the jurisdiction or power of a court over matters relating to the practice of law, inclusive of admission to the bar, investigations of claims of unethical practice and disciplinary actions including disbarment, includes within such power by reasonable necessity the authority to do those things necessary or attendant to the appropriate carrying out of such general powers, including the power to impose a membership fee for the support of such related activities.

Generally speaking, those powers which are necessary to the convenient and efficient exercise of its functions are said to be inherent in a court. *State, ex rel. McKean* v. *Graves* (1914), 91 Ohio St.23; also see *Held* v. *State* (1896), 55 Ohio St. 210. A court may act in a manner reasonably calculated to achieve a valid stated purpose, the purpose being valid so long as necessary to the convenient and efficient exercise of its functions.

The context in which the term "jurisdiction" is used in section 2(B) (1) (g) of the Constitution, the legislative history of that provision, and the conditions existing at the time of its adoption, clearly establish that the framers and adopters of this section used the term "jurisdiction" in the sense of power or authority vested in the Supreme Court over matters relating to the practice of law, and intended to clarify and codify the inherent authority of the Supreme Court over all matters relating to practice of law in this state.

The plaintiffs in the trial court below, and also upon this appeal, argue that even though the rules might be held to be unconstitutional, the Supreme Court is required, pursuant to Chapter 131 of the Revised Code, to deposit registration fees in the state treasury payable to the general fund of the state. We hold that the trial court properly rejected this claim as the trial court explained in its decision that if the court had construed the statutes to require the registration fees to be paid into the state treasury, the court would have been compelled to find the statutes invalid.

Matters concerning the practice of law are judicial in nature and primarily under the control of the judicial branch of the government. The General Assembly may enact statutes concerning such matters, but they have been interpreted as aids or guides to the judiciary. Such statutes are subservient to any rule adopted by the Supreme Court. *In re Nevius, supra.* In this discussional vein, we may cite the case of *Sharood* v. *Hatfield* (1975), 296 Minn. 416, 210 N.W.2d 275. The facts in that case show that the Minnesota legislature passed a statute which directed that registration fees to practice law provided for by court order should be directed to the general revenue fund of the state, and left to legislative discretion the matter of an appropriation to the Supreme Court for purpose of regulating the practice of law. The court rejected this attempted assertion of power by the legislature holding these provisions regulating the practice of law a constitutionally impermissible assumption of judicial power. It noted that the doctrine of separation of powers "not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction."

We hold that the trial court here properly held that Chapter 131 is not applicable to the collection of registration fees for the practice of law in Ohio, and the trial court properly did not construe sections R.C. 131.01 and R.C. 131.07 as being unconstitutional, and correctly applied the statutory interpretation which holds that where a statute is susceptible of two interpretations, one of which would render it

constitutional and the other unconstitutional, the court is required to choose the interpretation which will preserve its validity. *United Air Lines* v. *Porterfield* (1971), 28 Ohio St.2d 97; *Cincinnati* v. *DeGolyer* (1971), 25 Ohio St.2d 101.

As to any allegations or claims as contained in plaintiffs' complaint relating to any violation of the federal Constitution, we hold that such issues had been previously litigated in the federal court in the case of *Cuyahoga County Bar Assn.* v. *Supreme Court of Ohio, supra.* The plaintiffs are precluded by the doctrine of *res judicata* from relitigating in this action any claim which was litigated, or could have been litigated, in the federal court, and this would include any issues as raised and litigated as to the validity of the rules under the equal protection and due process clauses of the Fourteenth Amendment.

We also hold that the claims of violation of plaintiffs' due process and equal protection rights under the Ohio Constitution are without merit. The requirements of equal protection and due process of law of the Ohio Constitution are in essence the same as those to be found in the federal Constitution. *State, ex rel. Struble* v. *Davis* (1937), 132 Ohio St. 555, and *In re Appropriation of Easements* (1957), 104 Ohio App. 243. We hold that no such rights of these plaintiffs have been violated by the rules in question herein.

In the instant case, the trial court in ruling upon the motion for judgment on the pleadings spoke to the legal issue of the exercise of authority by the Supreme Court in promulgating rules relative to the regulation of the practice of law. The trial court pointed out that the Supreme Court had previously spoken to such issue in the case of *In re Nevius, supra.* As stated previously, the trial court also ruled on the issue of whether the fees collected pursuant to Gov. R. V need be deposited in the state treasury, pursuant to R.C. 131.01 and R.C. 131.07. The trial court correctly held that such funds need not be so deposited.

The trial court in its decision on the motion to dismiss quite correctly determined that Article IV, section 2(B) (1) (g) "does not confer original *and exclusive* jurisdiction in the Supreme Court in *all* matters relating to the practice of law. ***It is true that the grant of original jurisdiction contained therein is couched in broad terms and on its face appears unrestricted. Yet, this court is of the opinion that where actions taken pursuant to the grant are in direct conflict with other constitutional provisions they must be said to be improper."

We are in agreement with the trial court in this regard and believe that our court system should remain open to our citizens to test the lawfulness of the acts of any one of our three branches of government — the executive, legislative, or judiciary. Here it is our view that if the complaint had alleged certain facts such as the collection of an unreasonable and unwarranted registration fee, or a misuse or misappropriation of the collected funds, or had alleged other acts by the commission or its staff which were deemed to be unlawful, unconstitutional or unreasonable, such allegations would entail the necessary submission of evidence and would require a determination upon such facts. In any such instance, the merits of the matter could not have been decided upon a motion for judgment on the pleadings as was done here.

However, the complaint here does not specifically allege that the annual fee of twenty-five dollars is unreasonable or unwarranted, or allege any unlawful or unreasonable use of the fees collected, or any unlawful acts being committed by the commission or its staff. An overall reading of the complaint leads us to the conclusion that all of the allegations are not such that would require the court to entertain presentation of evidence in relation to such allegations, and that the court properly determined that it could decide the motion for judgment on the pleadings on the questions of law presented to the court.

We hold that the trial court was correct in finding that plaintiffs had failed to show that any of the challenged rules were clearly incompatible with any Ohio constitutional provision.

We further hold that the trial court was correct in determining that the Supreme Court of Ohio had authority under constitutional provision Article IV, section 2(B) (1) (g) to promulgate the rules in question in this action.

Based upon all of the foregoing, the assignment of error of appellant Crede Calhoun is hereby overruled, and all the assignments of error of appellant Cuyahoga County Bar Association are also hereby overruled.

Accordingly, the judgment of the Common Pleas Court of Franklin County is hereby affirmed.

REILLY and McCORMAC, JJ., concur.

Supreme Court, U. S.
FILED
OCT 3 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1979
Case No. 79-294

CREDE CALHOUN,
Petitioner,

vs.

ROBERT E. HOLMES, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

The Failure of the Court of Appeals to Answer the Assignments of Error 1

The Gross Misconduct of the Justices of the Ohio Supreme Court Denying Due Process to Petitioner Was Properly Raised 2

The disqualification of Respondents was raised at the first opportunity and in a manner appropriate under the Ohio practice 2

The Justices' Misconduct Cannot Be Excused on Independent State Grounds or Otherwise 4

1. The substantial party, financial and bias interest of Respondents 4
2. The importance of the questions affected by the petition 7

Appendix:

Respondents' Motion to Dismiss the Mandamus Complaint in the Supreme Court of Ohio A19

TABLE OF AUTHORITIES

Cases

Buschbacher v. Supreme Court of Ohio 5, 6
Calhoun v. Supreme Court of Ohio 7
Cuyahoga County Bar Assn. v. Supreme Court of Ohio, 430 U.S. 901 (1977) 5
Chicago B&Q R. Co. v. Chicago, 166 U.S. 226 (1896) 2
Dugan v. Ohio, 277 U.S. 61 (1928) 3
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 2
O'Brien v. Tenants (1975), 42 Ohio St. 2d 242 4
Hayes v. Smith (1900), 62 Ohio St. 161 3
State ex rel. Pressley v. Indus. Comm. (1967), 11 Ohio St. 2d 141, Syl. 6 4
State ex rel. Wanamaker v. Miller (1955), 164 Ohio St. 174 2
State ex rel. Wanamaker v. Miller (1955), 164 Ohio St. 176 3
Tumey v. Ohio, 273 U.S. 510 (1927) 3
Ward v. Village of Monroeville, 409 U.S. 57 (1972) 3

Constitutional Provisions and Court Rules

Ohio Constitution, Article IV, § 2 (A) 5
Rule of Practice of the Supreme Court of Ohio, eff. 8/16/71:
Rule V, § 65 4
Rule VI, § 6 4
Ohio Civil Rule 8(C) 6

Other Authorities

4 O. JUR. 3d, *Appellate Review*, p. 298 3
Ordover, *The Lawyer As Liar*, 2 AMERICAN JOURNAL OF TRIAL ADVOCACY 306 (1979) 7

Supreme Court of the United States

October Term, 1979
Case No. 79-294

CREDE CALHOUN,
Petitioner,

vs.

ROBERT E. HOLMES, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONER

THE FAILURE OF THE COURT OF APPEALS TO ANSWER THE ASSIGNMENTS OF ERROR

Considerations of time, expense and the relative unimportance of the question argue against continued assertion of the failure of the Court of Appeals to answer the numerous legal claims presented by the appeal of Petitioner and the Bar Association as a basis for this Petition at this time. In retrospect, it should not have been made a part of the Petition for Certiorari, since it has given Respondents a vehicle for confusing and obscuring the important question of judges raising and handling money under the claim of absolute power and then asserting the right to sit in judgment of their own such conduct.

THE GROSS MISCONDUCT OF THE JUSTICES OF THE OHIO SUPREME COURT DENYING DUE PROCESS TO PETITIONER WAS PROPERLY RAISED.

The Disqualification of Respondents Was Raised at the First Opportunity and in a Manner Appropriate Under the Ohio Practice.

Even though the Respondents in their adjudication of the Petitioner's and the Bar's mandamus action gave no indication of the grounds or reasons for its dismissal, the record demonstrates that the federal claim "was brought to the State court with fair precision and in due time" and that the necessary effect of Respondents' judgment was to deny the claim. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). Accordingly, the record demonstrates that the claim was raised at the first opportunity in a manner appropriate to and in conformity with existing Ohio procedures and practice. *Chicago B&Q R. Co. v. Chicago,* 166 U.S. 226, 231-232 (1896).

The suggestion by Respondents that their failure to disqualify themselves was decided on independent state grounds is sham. The request was made at the first opportunity by including it as part of the prayer of the Mandamus complaint, but not as part of the requested writ. In Ohio, Mandamus, as elsewhere, is a writ issuing from a superior tribunal to an inferior body. *State ex rel. Wanamaker v. Miller,* 164 Ohio St. 174, 175 (1955). It would have been improper to attempt to plead a claim for relief in Mandamus asking Respondents to issue a mandate to themselves to step aside.

No procedure is set forth by Ohio law or provision of the Ohio Constitution as to the manner of seeking disqualification of Justices of the Ohio Supreme Court. Respondents, even though given the constitutional power to do so, have promulgated no rules on this subject. The only case law on the subject is indefinite. In *State ex rel. Wanamaker v. Miller* (1955), 164 Ohio St. 176 it was stated:

> "As to the affidavit of disqualification and the right to file it, this court, *sua sponte,* strikes the affidavit from the files for the reason that the relator has no basis in law for filing it." (At p. 177.)

It is significant that Respondents at page three of their brief in fact make no claim that, *under the Ohio practice,* the federal claim was not properly raised by having amicus raise it in their brief. The cases cited by Respondents at page three of their brief are inapposite.

Under the Ohio law a question is preserved if it is brought to the attention of the trial court "by objection, ruling or otherwise". 4 O. JUR. 3d, *Appellate Review,* p. 298. *See Hayes v. Smith,* 62 Ohio St. 161, 188 (1900). Petitioner's request that Respondents disqualify themselves was contested by Respondents by arguments in their Brief in support of their Motion to Dismiss. Respondents' contest was opposed in the same manner.

The brief filed by Amicus Civil Liberties Union of Cleveland, Inc. opposed Respondents' Motion and unequivocally raised the denial of due process under Section 1 of the Fourteenth Amendment. This brief not only asserted the right to an impartial decision maker as fundamental to the guarantee of due process but cited and discussed in its support three decisions of this court:

Tumey v. Ohio, 273 U.S. 510 (1927)
Dugan v. Ohio, 277 U.S. 61 (1928)
Ward v. Village of Monroeville, 409 U.S. 57 (1972)

In addition, the only authority set out in the Appendix to Amici's brief was a recitation of the provision of Section

1 of the Fourteenth Amendment of the United States Constitution.

In Ohio Amicus Curiae are accorded the same rights to raise and argue questions before Respondents as are parties, except that Amici can present oral arguments only with the consent and within the time allotted to an attorney of record. Rules of Practice of the Supreme Court of Ohio, Rule V, § 65, Rule VI, § 6. There is no Ohio decisional law even suggesting that constitutional questions cannot be raised by Amicus.

THE JUSTICES' MISCONDUCT CANNOT BE EXCUSED ON INDEPENDENT STATE GROUNDS OR OTHERWISE.

1. The Substantial Party, Financial and Bias Interest of Respondents.

As pointed out in Petitioner's and the Bar's brief in support of the request for disqualification, the mandamus complaint raised questions which affected the substantial party, financial and bias interest of Respondents. The very nature of the relief sought posed a serious[1] threat to Respondents of a remand to the Court of Appeals and eventually to the trial court to complete discovery and, after discovery, to complete its determination of the declaratory judgment action. This determination would have included the legality of Respondents' expenditures from this million dollar fund and Respondents' liabilities as trustees for any loss or misappropriation.[2]

The briefs also pointed out the possibility of judicial rebuke by the seven Courts of Appeals' judges sitting in the place of Respondents, as provided for by Article IV, § 2 (A) of the Ohio Constitution, for the deliberate deceit practiced by Respondents as advocate parties attempting to avoid any adjudication which would place specific limits on their power or permit an examination of their handling of this Fund. This is a consequence which even nonelected judges would try to avoid if they had the power to do so.

One of the many instances of judicial deceit pointed out in the briefs was Respondents' highly misleading characterization as parties, of the decision of this court in *Cuyahoga County Bar Assn. v. Supreme Court of Ohio,* 430 U.S. 901 (1977) (p. A20). This type of deliberately misleading legal analysis is illustrated in the claim asserted by Respondents to this court, that the decision in *Buschbacher v. Supreme Court of Ohio* (pp. 3a-4a) collaterally estops Petitioner from relitigating whether Respondents "are a fair and impartial tribunal to determine his claims." (Respondent's brief, p. 4.)

1. It is obvious that an unbiased tribunal could readily have determined that the complaint raised a claim for relief applying the Ohio standard that such motion can be granted only where it appears "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Tenants* (1975), 42 Ohio St. 2d 242, 245. Applying this standard, an unbiased tribunal could have then determined that the Court of Appeals deliberately evaded answering numerous important questions properly before it in violation of their *clear* obligation under Rule 12(A) and that Petitioner's and the Bar's right to request Respondents to certify this question, did not constitute an adequate remedy in the *ordinary* course of the law. See *State, ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St. 2d 131, Syl. 6. (The remedies of statutory mandatory injunction or statutory mandamus available in the Common Pleas Court do not constitute adequate remedies which can defeat the right to bring an original action in mandamus in the Supreme Court of Ohio.)

2. If it is the law that a lawyer who is elected to the bench is, upon assuming office, conclusively presumed to be able to handle public monies without any loss, while the same lawyer elected Governor, Attorney General, County Commissioner, etc., is not to be so naively trusted, it should be established by direct judicial determination and not by inference drawn from the judicial silence of the trial court, the Court of Appeals and the Ohio Supreme Court.

Must Petitioner, in order to avoid drawing an inference of bad faith on the part of Respondents, assume that they are not aware that, under their own rules of procedure, collateral estoppel is an affirmative defense which must not only be pleaded but established by proof? Ohio Civil Rule 8(C). Or can Petitioner reasonably, in view of the failure of Respondents to assert such a position to themselves in support of their Motion to Dismiss the mandamus complaint (pp. A19-A23), conclude that the unavoidable inference to be drawn is that Respondents deliberately intend to mislead this court.

The nature of the certification in *Buschbacher* which Respondents claim conclusively establishes their pristine judicial posture forever is intriguing, since the Federal Court judges only determined that Respondents were not shown to be a biased forum for the determination of a very *limited* issue, namely, whether an attorney should be disciplined for failure to pay the registration fee. The claim rejected in *Buschbacher* was not one made by Petitioner and the Bar in the Federal Court action.

Only a foolish lawyer would claim that Respondents, because they made the rules, could not determine whether an attorney had, in fact, paid or not paid his registration fee. This question is a far cry from the question of whether Respondents, sitting in their own case, can determine whether they do or do not have the constitutional power under the Ohio Constitution to raise and spend public funds without external accountability and whether they are or are not accountable for any loss or misappropriation.

Deliberate judicial misconduct is hardly the way to achieve "the highest possible professional conduct"[3] in a

3. See Court of Appeals' opinion at page 7b of Respondents' Appendix.

profession already plagued with the Monroe Friedman view that, in the zealous defense and prosecution of their client's rights, lawyers can be liars. *See* Ordover, *The Lawyer as Liar,* AMERICAN JOURNAL OF TRIAL ADVOCACY 306 (1979).

The inference that in the related case, *Calhoun v. Supreme Court of Ohio,* the question of whether Respondents should disqualify themselves was not raised is, to be blunt, false. The justices' disqualification was raised, not only by a specific proposition of law, but by a motion. Both were met with Judicial silence.

Whether in fact Respondents have been compensated out of the Disciplinary Counsel's Fund for expenses incurred by them in disciplinary matters, is a question only indirectly addressed by Respondents in their brief. It is submitted that such question should have been a matter of proof in the trial court, rather than a self-serving unsworn, indirect assertion in the last paragraph of the brief filed with this court.

2. The Importance of the Questions Affected by the Petition.

The importance of the ultimate questions which will be affected by the within petition can be fully realized only if it is placed in the context of recent history in which powerful and prestigious lawyers have received kid glove treatment by disciplinary authorities because of the importance of the matters they were engaged in.

It is submitted that our profession has been demeaned long enough by a secretive unaccountable disciplinary system which arrogates to lawyers and judges such decisions as, for example, whether lawyers can be liars and still

continue to practice law and which permits judges to sit in their own cause.

Respectfully submitted,

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APPENDIX

RESPONDENTS' MOTION TO DISMISS THE MANDAMUS COMPLAINT IN THE SUPREME COURT OF OHIO

Case No. 79-177

IN THE SUPREME COURT OF OHIO

CREDE CALHOUN, *et al.*,
Relators,

v.

ROBERT E. HOLMES, *et al.*,
Respondents.

ORIGINAL ACTION IN MANDAMUS

MOTION OF RESPONDENTS FRANK D. CELEBREZZE, THOMAS M. HERBERT, WILLIAM B. BROWN, PAUL W. BROWN, A. WILLIAM SWEENEY, RALPH S. LOCHER AND THOMAS L. STARTZMAN TO DISMISS

Respondents, the Supreme Court of Ohio; Frank D. Celebrezze, Chief Justice; Thomas M. Herbert, William B. Brown, Paul W. Brown, A. William Sweeney and Paul S. Locher, Justices of the Supreme Court of Ohio; and Thomas L. Startzman, Clerk of the Supreme Court of Ohio, respectfully move this Court, pursuant to Rule 12(B) of the Rules of Civil Procedure, to dismiss the Complaint filed herein on the ground that it fails to state a claim upon which relief may be granted.

MEMORANDUM IN SUPPORT OF MOTION

STATEMENT OF THE CASE

Relators instituted an action in the Court of Common Pleas of Franklin County, Ohio, challenging the validity of the portion of the Rules for the Government of the Bar providing for the registration of all attorneys in the state and the payment of a registration fee.

Relators had previously instituted an action in federal court challenging the validity of the same rules. In that action it was determined that the constitutional objections to the rules were without merit and that the rules were in compliance with the provisions of the Federal Constitution. *Cuyahoga County Bar Assn. v. Supreme Court of Ohio,* 430 U.S. 901 (1977).

The Court of Common Pleas sustained the motion of the defendants for judgment on the pleadings finding that there was no dispute as to any material fact and that the defendants were entitled to judgment as a matter of law. Copies of the Judgment Entry and Decision of that court are attached hereto as Appendices A and B.

The Court of Appeals affirmed the judgment of the Court of Common Pleas. It held that the Supreme Court did have the authority to adopt the challenged rules. In its opinion the court explained that historically the Supreme Court, through the exercise of its inherent power, has concerned itself with matters relating to the practice of law and that its practice of adopting rules, which imposed assessments and appointed the personnel necessary to carry out that function, was well established.

The people, by their adoption of the Modern Courts Amendment, embodied this inherent power in the Constitution, by expressly granting the Supreme Court jurisdiction over all matters relating to the practice of law. A copy of the Decision is attached hereto as Appendix C.

Relators filed a motion for reconsideration claiming that the Court of Appeals had not passed upon all of their assignments of error. The court denied the motion on the ground that all of the basic issues were in fact covered and dealt with in its opinion. A copy of that Decision is attached hereto as Appendix D.

Relators filed a notice of appeal from that judgment. In their memorandum in support of jurisdiction, they raised all of the issues raised in the instant case.

Relators then instituted this action alleging that the Court of Appeals failed to pass on all of their assignments of error and seeking a writ of mandamus directing that court to do so.

ARGUMENT

Proposition of Law No. 1

> In Order to State a Cause of Action in Mandamus, a Relator Must Establish a Clear Right to the Performance of a Definite, Specific and Absolute Legal Duty Imposed Upon and Violated by the Respondent.

The relators have the burden of establishing that they are entitled to the extraordinary remedy of mandamus. *State ex rel. Alcoa v. Stebbins,* 40 Ohio St. 2d 52, 54 (1974); paragraph one of the syllabus of *State ex rel. Welsh v. Ohio St. Medical Bd.,* 176 Ohio St. 136 (1964). In order to sustain this burden, they must allege and establish that they have a clear right to the performance of a definite, specific and absolute legal duty imposed upon and violated by these respondents. *State ex rel. Auto*

Loan Co. v. Jennings, 14 Ohio St. 2d 152, 162 (1968); *State ex rel. Bd. of Tax Appeals v. Morgan Co. Budget Comm.,* 174 Ohio St. 297, 299 (1963); *State ex rel. Spellmire v. Kauer,* 173 Ohio St. 279 (1962).

Relators have failed to sustain their burden in the instant case. They are asking these respondents to disqualify themselves from considering and determining this action. There is nothing in the Complaint, however, which could support a finding that relators have a right to such relief or that these respondents have a duty, much less a definite, specific and absolute duty, to disqualify themselves. In fact the relators give no explanation whatsoever for their request.

Relators have failed to establish any legal duty upon these respondents to disqualify themselves. They have, therefore, failed to state a claim upon which relief in mandamus may be granted. *State ex rel. Akron Fire Fighters v. Akron,* 54 Ohio St. 2d 448, 450-451 (1978).

Proposition of Law No. 2

A Writ of Mandamus Must Be Denied if the Relator Has a Plain and Adequate Remedy by Way of Appeal.

Relators have filed an appeal from the judgment which they are attacking in the instant case. In their memorandum in support of jurisdiction, they raise the same claim raised herein, that the Court of Appeals failed to pass upon each of the assignments of error.

Where the relator in a mandamus action has an adequate remedy by way of appeal, this Court is required to deny the writ. Paragraph 3 of the syllabus of *State ex rel. Pressley v. Indus. Comm.,* 11 Ohio St. 2d 141 (1967); paragraph 1 of the syllabus of *State ex rel. Sibarco v. Berea,* 7 Ohio St. 2d 85 (1966); paragraph 3 of the syllabus of *State ex rel. Stanley v. Cook,* 146 Ohio St. 348 (1947); *Lippert v. Engle,* 52 Ohio St. 2d 67 (1977); *State ex rel. Wentz v. Correll,* 41 Ohio St. 2d 101 (1975).

CONCLUSION

For the above reasons these respondents submit that relators have failed to state a claim in mandamus upon which relief may be granted and that the Complaint should be dismissed.

Respectfully submitted,

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